Supreme Court, U.S.
FILED
JUN 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1828

In the Supreme Court of the United States

OCTOBER TERM, 1986

F. GEORGE ALBERTUS, et al.,
Appellants,

vs.

STATE TAX COMMISSION OF MISSOURI, et al.,
Appellees.

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

WILLIAM L. WEBSTER
Attorney General
CURTIS F. THOMPSON
(Counsel of Record)
Assistant Attorney General
RICHARD L. WIELER
Assistant Attorney General
Broadway State Office Building
221 West High Street, 7th Floor
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-8826
Attorneys for Appellees

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

208

TABLE OF CONTENTS

I. THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE 1

A. The Statute 1

B. The Proceedings Below 4

II. ARGUMENT 6

The Case Presents No Substantial Question For Review Or Decision By This Court 6

III. CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) 7

Application of Korzen, 380 N.E.2d 852 (Ill.App. 1978) 9

Associated Industries of Missouri, et al. v. State Tax Commission of Missouri, et al., 722 S.W.2d 916 (Mo. banc 1987) 5

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 10

Costner v. United States, 720 F.2d 539 (8th Cir. 1983) 10

Dane v. Jackson, 256 U.S. 589 (1921) 10

Hegenes v. State, 328 N.W.2d 719 (Minn. 1983) 9

Howell v. Malone, 388 So.2d 908 (Ala. 1980) 9

In re U.S. ex rel. Mo. State High School Activities Association, 682 F.2d 147 (8th Cir. 1982) 10

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 7

Madden v. Kentucky, 309 U.S. 83 (1940) 7

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) 10

Pacific Express Co. v. Seibert, 142 U.S. 339 (1892) 6

Railroad Company v. Pennsylvania, 134 U.S. 232 (1890) 6

Roosevelt Properties v. Kinney, 465 N.E.2d 421 (Ohio 1984) 9

Walters v. City of St. Louis, 259 S.W.2d 377 (Mo. banc 1953), aff'd 347 U.S. 231 (1954) 6, 11

Constitutional Provisions:

United States Constitution,
Amendment XIV 4, 6, 10

Missouri Constitution:
Article X, § 4(b) 2

Statutory Provisions:

§ 137.016.1, RSMo 1986 .....*passim*

No. 86-1828

In the Supreme Court of the United States

OCTOBER TERM, 1986

F. GEORGE ALBERTUS, et al.,
Appellants,

vs.

STATE TAX COMMISSION OF MISSOURI, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Missouri on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of § 137.016, RSMo 1986, particularly that section which classifies structures containing four or fewer human dwelling units as "residential" and five or more such units as "commercial" for the purpose of assessment of real property taxes. By amendment to the state constitution, the citi-

zens of Missouri established three subclassifications of real property for the purpose of assessment of real property taxes: (1) residential property; (2) agricultural property; and (3) utility, industrial, commercial and railroad property ("commercial property"). Article X, § 4(b) of the Missouri Constitution, adopted in 1982. The same amendment also permitted the legislature to define the property in the three subclasses and to fix the percentage of its value to be used for tax assessment purposes. The legislature's definition of the three subclassifications of real property is contained in § 137.016.1, RSMo 1986, which provides as follows:

> 1. As used in section 4(b) of article X of the Missouri Constitution, the following terms mean:
>
> (1) "Residential property", all real property improved by a structure which is used or intended to be used for residential living by human occupants and which contains not more than four dwelling units or which contains single dwelling units owned as a condominium or in a cooperative housing association. The term "cooperative housing association" means an association, whether incorporated or unincorporated, organized for the purpose of owning and operating residential real property in Missouri, the shareholders or members of which, by reason of their ownership of a stock or membership certificate, a proprietary lease or other evidence of membership, are entitled to occupy a dwelling unit pursuant to the terms of a proprietary lease or occupancy agreement; vacant land in connection with an airport, and land used as a golf course shall be classified as residential property;
>
> (2) "Agricultural and horticultural property", all real property used for agricultural purposes and de-

voted primarily to the raising and harvesting of crops; to the feeding, breeding and management of livestock; to dairying, or to any other combination thereof; and buildings and structures customarily associated with farming, agricultural, and horticultural uses. Agricultural and horticultural property shall also include land devoted to and qualifying for payments or other compensation under a soil conservation or agricultural assistance program under an agreement with an agency of the federal government. Real property classified as forest croplands shall not be agricultural or horticultural property so long as it is classified as forest croplands and shall be taxed in accordance with the laws enacted to implement section 7 of article X of the Missouri Constitution;

(3) "Utility, industrial, commercial, and railroad property", all real property of every kind used directly or indirectly, or held for use, for any commercial, mining, industrial, manufacturing, trade, professional, business, or similar purpose, including all property centrally assessed by the state tax commission. Except as may be determined pursuant to subsection 3 or 4 of this section, all other real property not included in the property listed in subclasses (1) and (2) of section 4(b) of article X of the Missouri Constitution, as such property is defined in this section, shall be deemed to be included in the term "utility, industrial, commercial and railroad property".

Later, the legislature established the following percentages of value for assessment purposes for the subclasses of real property:

Residential property in subclass 1—19%

Agricultural and horticultural property in subclass 2—12%

Utility, industrial, commercial, railroad and all others in subclass 3—32%.

B. The Proceedings Below

On May 6, 1985, the appellants sought a declaratory judgment in the Circuit Court of Cole County, Missouri, against the State Tax Commission of Missouri and its individual members alleging, among other things, that the legislative definitions in § 137.016.1, RSMo 1986, which classified structures containing four or fewer human dwelling units as "residential" and five or more dwelling units as "commercial" violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Appellants alleged that the selection of four units as the delineation between residential and commercial property was palpably arbitrary and not rationally related to any conceivable legitimate state objective that might be served by a constitutional amendment permitting classification of real property as "residential" or "commercial."

On June 7, 1985, the Missouri Merchants and Manufacturers Association filed a motion to intervene as a party defendant in support of the statute as written.

On June 11, 1985, plaintiffs Associated Industries, Mattern, Ramsey, Lueders, Ortloff, Stahl, Centrifugal and Mechanical Industries, Inc., and the Hesse Corp. (hereinafter "Associated Industries") filed a declaratory judgment action in the Circuit Court of Cole County, Missouri, alleging, among other things, violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that only owner-occupied real prop-

erty should be subclassed as residential and all real property rented to others should be subclassed as commercial real property.

The two cases were consolidated on August 23, 1985, and the judge assigned to the cause issued his judgment on September 12, 1986, after motions for summary judgment were filed by the appellants and by Associated Industries. Specifically, the trial judge found that the words "and which contain no more than four dwelling units" in § 137.016.1(1), RSMo 1986, resulted in a real property subclass definition which, among other things, violated the Equal Protection and Due Process Clauses of the United States Constitution.

On appeal, the Missouri Supreme Court disposed of all issues in favor of appellees and against appellants and Associated Industries. *Associated Industries of Missouri, et al. v. State Tax Commission of Missouri, et al.*, 722 S.W.2d 916 (Mo. banc 1987). In a sharply divided decision (three in the majority, one concurring, and three separate dissents), the Missouri Supreme Court found that the action of the Missouri legislature allocating rental property between "residential" and "commercial" on the basis of four or less dwelling units versus five or more was not arbitrary or unreasonable. The Missouri Supreme Court found that the selection of a definite figure, such as four, by the Missouri legislature offered the most effective means of classifying rental property into residential and commercial categories.

II

ARGUMENT

The Case Presents No Substantial Question For Review Or Decision By This Court

In their statement of jurisdiction, appellants argue that the legislative distinction between four and five rental units in § 137.016.1, RSMo 1986, cannot be sustained under the Equal Protection and Due Process Clauses of the Fourteenth Amendment because the distinction bears no rational relationship to any conceivable legitimate state object. By making the argument, appellants concede that the classification here does not involve fundamental personal rights or suspect distinctions such as race, religion or alienage.

The validity of classification and subclassification for tax purposes has been recognized throughout the twentieth century. In *Pacific Express Co. v. Seibert,* 142 U.S. 339 (1892), the taxpayer claimed that a certain tax was in violation of the Equal Protection Clause of the Fourteenth Amendment. This Court held that the Fourteenth Amendment "does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate" and then went on to state that the Fourteenth Amendment was not intended to compel the state to adopt "an iron rule of equal taxation." *Id.* at 351-352. *See also, Railroad Company v. Pennsylvania,* 134 U.S. 232, 237 (1890).

In *Walters v. City of St. Louis,* 259 S.W.2d 377 (Mo. banc 1953), aff'd 347 U.S. 231, 237 (1954), this Court noted that equal protection does not require identity

of treatment of all persons so long as all those in the same tax classification or category are accorded equality of rights. In *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522 (1959), this Court held that the states have a very wide discretion in the laying of their taxes and that there is no iron rule of equality prohibiting the flexibility and variety that are appropriate to reasonable schemes of taxation. As the Court noted, "to hold otherwise would be to subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure." 358 U.S. at 527. In the field of taxation, this Court has made it clear that state legislatures possess the greatest freedom in classification. *Madden v. Kentucky,* 309 U.S. 83, 88 (1940); *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359 (1973).

No one challenges the legitimacy of the state exercising its taxing power through the imposition of ad valorem taxes on real property. The constitutional challenge turns on whether the classifications created by the legislature are rationally related to the state's interest in taxation. Even the appellants concede that the proper standard of review under the Equal Protection Clause and the Due Process Clause is that the tax classifications established by the legislature have a rational basis; they cannot be palpably arbitrary. *Allied Stores of Ohio, Inc.,* 358 U.S. at 527.

The criteria used by the General Assembly in Missouri to define a residential subclassification in § 137.016.1(1), RSMo 1986, is reasonable and should be sustained. "Residential property" is defined as that property which is "used

and intended to be used for residential living by human occupants and which contains not more than four dwelling units." This definition looks to the use of the property by the owner of the property, not necessarily the tenant. The line between the number of dwelling units to be considered residential property and the number which must be considered commercial income producing property had to be drawn somewhere. Obviously, the owner of a large apartment complex is concerned about the production of income even though the tenants of that complex may regard the same structure or structures as residential. Admittedly, the line is blurred when the distinction is created between the assessment ratio applied to a four-unit apartment building and a five-unit apartment building, but that blurring does not rise to the level of a constitutional violation.

The demarcation as residential of four or fewer dwelling units is not unreasonable. This definition includes all owner-occupied single family homes; it also includes a fairly common occurrence where the owner lives in one unit of a duplex, triplex or four-plex and rents the other units. By using a four unit criteria, the legislature was able to encompass the great majority of typical owner-occupied dwellings without the administrative burden of proving owner occupancy. There may have been other ways to accomplish that end, but the means of producing a reduced tax burden to homeowners is best left to the discretion and wisdom of the legislative branch, and not to the courts.

It must be remembered that the various subclasses of real property are based upon the use to which the owner puts the property. In keeping with this, the Missouri legislature has made a determination that property with four or fewer dwelling units includes property held pre-

dominantly for use by the owner as a residence whereas dwelling units of five or more necessarily include property primarily used to generate an income stream to the owner.

The number of dwelling units has been used in other jurisdictions to support different treatment of real property. In *Hegenes v. State,* 328 N.W.2d 719 (Minn. 1983), the Minnesota Supreme Court upheld a state statute which classified residential properties of three units or less diffent from those properties with four units or more. The court found that there are obvious differences in size, management, ownership, markets, and appraisal approaches in the small units as opposed to the large residential properties. The court found that the distinction between the two classes was genuine and not fanciful and the classification was not wide of any reasonable mark. *Id.* at 722.

The use of four or fewer residential units as a dividing point was specifically approved in *Roosevelt Properties v. Kinney,* 465 N.E.2d 421 (Ohio 1984). In this case, the classification was by administrative rule. The taxpayer argued that all residential property was not being taxed uniformly since apartments of four or fewer were entitled to certain tax reduction factors while buildings with more units were not. The Ohio Supreme Court found that the larger units were held for "commercial expectations" and were utilized in a business capacity. *See also, Application of Korzen,* 380 N.E.2d 852 (Ill.App. 1978), and *Howell v. Malone,* 388 So.2d 908 (Ala. 1980).

In determining which property should be considered residential and which commercial, the Missouri General Assembly used a generally accepted distinction. Numerous state and federal statutes and regulations distinguish between properties based on the number of dwelling units. These statutes and regulations range over the topics of

liens, interest rates, mortgages, income taxation, fair housing, settlement procedures, savings and loan associations, defense housing, energy conservation, and other subjects. (See Appendix A for a list of Missouri state statutes and federal statutes and regulations which classify by reference to a number of dwelling units.)

The requirement that a classification have a rational relationship to a legitimate state interest which satisfies the Equal Protection Clause of the Fourteenth Amendment also satisfies substantive due process. Furthermore, there is no requirement under the due process clause that the amount of general revenue taxes collected must be reasonably related to the value of the services provided. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624 (1981). The Fourteenth Amendment only prohibits imposition of tax on due process grounds when no benefits whatsoever are returned to the taxpayer or when the benefits returned are negligible; the Due Process Clause does not address alleged inequities in the scheme of taxation which do not rise to the level of governmental taking. *Dane v. Jackson*, 256 U.S. 589, 599 (1921). Appellants have not claimed lack of benefits in return for the payment of property taxes to the State of Missouri.

A classification does not offend the Constitution simply because it is not made with mathematical nicety or because in practice it results in some inequality. *In re U.S. ex rel. Mo. State High School Activities Association*, 682 F.2d 147, 152 (8th Cir. 1982). The question of where to draw the line that creates a distinction is particularly a legislative task and an unavoidable one. *Costner v. United States*, 720 F.2d 539, 541 (8th Cir. 1983). Perfection in drawing a line is neither possible nor necessary in order to retain constitutionality. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

One attacking a classification of the legislature bears the burden of negating any conceivable basis which might support that classification. *Walters v. City of St. Louis*, 259 S.W.2d 377, 386 (Mo. banc 1953), aff'd 347 U.S. 231 (1954). No one here has challenged the legitimacy of the State of Missouri exercising its taxing power through the imposition of ad valorem taxes on real property. As stated earlier, this Court has upheld the classification and subclassification of property for tax purposes. Appellants have attempted to create a substantial question for determination by this Court by focusing on the tenants of apartment dwellings rather than the owners. Since a tenant would consider his dwelling to be a "residence," appellants argue that the legislature in Missouri could not consider any apartment dwelling as a commercial enterprise. Assuming facts not in the record and ignoring other factors which influence the market, appellants even claim that § 137.016.1, RSMo 1986, discriminates against the poor and the homeless because the property taxes imposed on this commercial property will be passed along to the tenants. However, this diversionary tactic does not highlight a constitutional problem, as suggested by appellants, it merely reflects their unwillingness to deal with the fact that owning an apartment complex is a commercial enterprise to the owner, the taxpayer who the Missouri legislature tried to reach in § 137.016.1(1) by drawing a line to distinguish commercial property from residential property. Since appellants cannot launch a constitutional challenge against the classification of commercial as opposed to residential property for ad valorem tax purposes, they are forced to quibble over the precise location of the line drawn by the Missouri legislature. This does not rise to the level of a substantial question for review or decision by this Court.

III

CONCLUSION

WHEREFORE, appellees respectfully submit that the question upon which this cause depends is so unsubstantial as not to need further argument, and appellees respectfully move the Court dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Missouri.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General
CURTIS F. THOMPSON
(Counsel of Record)
Assistant Attorney General
Missouri Bar No. 25171
RICHARD L. WIELER
Assistant Attorney General
Missouri Bar No. 20348
Broadway State Office Building
221 West High Street, 7th Floor
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-8826
Attorneys for Appellees

APPENDIX A

§ 137.016, RSMo 1986	Property taxes. Not more than four dwelling units.
§ 429.013, RSMo 1986	Mechanic's liens. Residential, property of four units or less.
§ 408.015(6), RSMo 1986	Interest. Real estate used or intended to be used as a residence by not more than four families.
§ 408.231.3, RSMo 1986	Second mortgage loans. Real estate used or intended to be used as a residence by not more than four families.
§ 408.570(5), RSMo 1986	Residential real estate loans. Real estate used or intended to be used as a residence by not more than four families.
§ 148.470(3), RSMo 1986	Savings and loan associations tax. Real estate upon which there is located a dwelling or dwellings for not more than four families.
12 U.S.C. § 1454(a)(2)	Federal Home Loan Mortgage Corp. One to four family dwelling units.
12 U.S.C. § 1454(a)(4)(A)(ii)	Federal Home Loan Mortgage Corp. Five or more family dwelling units.
12 U.S.C. § 1701j-3(d)	Due on sale clauses. Less than five dwelling units.
12 U.S.C. § 1709(b)(2)	Mortgage insurance. One to four family dwelling units.

12 U.S.C. § 1715e(d)	Cooperative housing insurance. Five or more family units.
12 U.S.C. § 1715l(f)	Moderate income housing. Five or more family units.
12 U.S.C. § 1715n(b),(d)	Mortgage insurance. One to four family units.
12 U.S.C. § 1715p	Open end mortgage. Dwelling designed principally for residential use for not more than four families.
12 U.S.C. § 1715z(c)(2)(A),(q)(10)(C)	Low income home ownership. Two to four family property.
12 U.S.C. § 1715Z-1(j)(5)(B)	Low income rental housing. Five or more dwelling units.
12 U.S.C. § 1715z-18(a)	Shares appreciation mortgages. Five or more family units.
12 U.S.C. § 1717(b)(5)(A),(C)	FNMA, GNMA mortgages. One to four family residence.
12 U.S.C. § 1723e(b)	FNMA, GNMA mortgages. One to four family residence.
12 U.S.C. § 1723e(b)	FNMA, GNMA mortgages. More than four family residences.
12 U.S.C. § 1723h(b)	Solar Energy Conservation Bank. One to four family dwelling units.
12 U.S.C. § 1735b(a)	Defects in mortgaged homes. One to four family dwelling units.

12 U.S.C. § 1735f-6	Secondary mortgages. One family dwelling units.
12 U.S.C. § 1745	War housing insurance. Dwelling designed principally for residential use for not more than four families.
12 U.S.C. § 1757(5) (A) (i)	Federal credit unions. One to four family dwelling units.
12 U.S.C. § 2602(1) (A)	Real estate settlement procedures. Designed principally for the occupancy of one to four families.
12 U.S.C. § 3602(2),(3)	Solar Energy Conservation Bank. Residence which does not contain more than four dwelling units.
12 U.S.C. § 3609(a)	Solar Energy Conservation Bank. One, two, three, or four dwelling units.
12 U.S.C. § 3610(a)	Solar Energy Conservation Bank. One, two, three, or four dwelling units.
15 U.S.C. § 1602(v)	Consumer credit protection (truth in lending, fair credit reporting). One to four family housing units.
26 U.S.C. § 103A(1) (9)	Internal Revenue Code. Two, three, or four family residences.
26 U.S.C. § 6323(b) (7)	Internal Revenue Code. Not more than four dwelling units.

38 U.S.C. § 1827(a)	Veterans' benefits. One to four family dwelling units.
42 U.S.C. § 1524	National defense housing. Not more than four family dwelling units.
42 U.S.C. § 1587(b),(c)	Disposal of war housing. Dwelling structure designed for occupancy by not more than four families.
42 U.S.C. § 1592a(a)	National defense housing. Not more than four families.
42 U.S.C. § 3540(a)	HUD Department. One to four family dwelling units.
42 U.S.C. § 8211(9)(B)	Residential energy conservation. At least one but not more than four dwelling units.
42 U.S.C. § 8225 (P.L. 95-619, 92 Stat. 3223)	Residential energy conservation. Not more than four dwelling units.
42 U.S.C. § 8281(b)(3)	Multifamily energy conservation. Five or more dwelling units.
12 C.F.R. § 29.1	Adjustable rate mortgages. One to four family dwelling units.
12 C.F.R. § 203.2(c)	Home mortgages disclosure. Designed principally for occupancy of one to four families.
12 C.F.R. § 203.4(b)(2)	Home mortgages disclosure. One to four family dwelling units.

12 C.F.R. § 226.2(a)(19)	Truth in lending (Reg. Z). Residential structure that contains one to four dwelling units.
12 C.F.R. § 228.4(b)(2)	Community reinvestment. One to four family dwelling units.
12 C.F.R. § 338.1(f)(1)	Fair housing. One to four residential units.
12 C.F.R. § 541.14	Federal savings and loan. Dwelling units for four or fewer families.
12 C.F.R. § 203.38	Mutual mortgage insurance. Residential use for not more than four families.